

Montana Water Court  
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**FILED**  
04/05/2023  
Sara Calkins  
CLERK  
Montana Water Court  
STATE OF MONTANA  
By: D'Ann CIGLER  
43B-0783-R-2022  
Lambert, Kathryn  
6.00

MONTANA WATER COURT, YELLOWSTONE DIVISION  
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN  
BASIN 43B  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Michelle R. Barber; Robert E. Barber; Kent Ditch Co.

**CASE 43B-0783-R-2022**

43B 41756-00

NOTICE OF INTENT TO APPEAR: BK & K LLC

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's finding of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

This claim appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED FLOW RATE EXCEEDS THE 17 GPM PER ACRE GUIDELINE AND CANNOT BE  
CONFIRMED DUE TO LACK OF DATA. THE FLOW RATE EQUALS 27.00 GPM PER ACRE.

BK & K LLC filed a notice of intent to appear.

The issue remark was not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by

the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimants an opportunity to file additional information or evidence. On February 1, 2023 Claimants Barbers' Motion To Remove Issue Remark And Brief In Support was filed. As the attorney who filed the Motion also represents BK & K LLC, it appears the Motion was filed by the Barbers and BK & K LLC. The Certificate of Service states that it was sent to Kent Ditch Company. No answer brief was filed by Kent Ditch Company. The Motion is viewable in the Court's FullCourt Enterprise case management system.

#### APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

Failure to file an answer brief within fourteen days is deemed an admission that the motion is well-taken. Rule 2(b) and (c), U.D.C.R.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

#### FINDING OF FACT

The Preliminary Decree states that the flow rate is 50.00 cfs. The Memorandum of Kaitlin McLane is attached to support the Motion. The Memorandum includes the following:

For reference, the Kent Ditch is located in Sweet Grass County approximately 20 miles southeast of Big Timber. This reach of the Yellowstone River Valley adjacent to the Kent Ditch is narrow and bounded by rocky cliffs. The ditch itself has a shallow slope and irrigates the valley bottom along the Yellowstone River. Given this topography, a substantial head of water would be required to sufficiently carry water to the shareholders at the far end of the 7.5 mile long ditch.

The flow rate should not be changed. The flow rate issue remark should be removed as addressed and resolved.

### CONCLUSION OF LAW

The Motion is sufficient to resolve the issue remark without evidentiary hearing.  
Sections 85-2-248(3) and (11), MCA.

### RECOMMENDATIONS

Based upon the above Finding of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Finding of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

### **ELECTRONICALLY SIGNED AND DATED BELOW**

#### Service Via USPS Mail:

Kent Ditch Co.  
% Andy Butts  
PO Box 417  
Reed Point, MT 59069

#### Service Via Email:

Abigail R. Brown  
Attorney at Law  
Parsons Behle & Latimer  
127 East Main Street, Suite 301  
Missoula, MT 59802  
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**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 41756-00 STATEMENT OF CLAIM

**Version:** 5 -- POST DECREE

**Status:** ACTIVE

**Owners:** KENT DITCH CO  
% ANDY BUTTS  
PO BOX 417  
REED POINT, MT 59069

ROBERT E BARBER  
1499 HWY 10 E  
REED POINT, MT 59069

MICHELLE R BARBER  
1499 HWY 10 E  
REED POINT, MT 59069

**Priority Date:** JULY 1, 1894

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FURROW

**Flow Rate:** 50.00 CFS

FLOW RATE FOR THIS RIGHT IS LIMITED TO THE HISTORIC CAPACITY OF THE  
DIVERSION STRUCTURE AND CONVEYANCE SYSTEM.

**\*Volume:** 11,164.29 AC-FT

**Climatic Area:** 2 - MODERATELY HIGH

**\*Maximum Acres:** 838.00

**Source Name:** YELLOWSTONE RIVER

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENWNW	19	1S	17E	SWEET GRASS

**Period of Diversion:** MAY 15 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Ditch Name:** KENT DITCH

**Period of Use:** MAY 15 TO OCTOBER 31

**\*Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	9.00		S2SENE	19	1S	17E	SWEET GRASS
2	34.00		SE	19	1S	17E	SWEET GRASS
3	32.25		S2S2NW	20	1S	17E	SWEET GRASS
4	152.75		SW	20	1S	17E	SWEET GRASS

5	22.00	S2SW	27	1S	17E	SWEET GRASS
6	97.50	SE	28	1S	17E	SWEET GRASS
7	138.00	SW	28	1S	17E	SWEET GRASS
8	53.50	S2N2	28	1S	17E	SWEET GRASS
9	83.25	NE	29	1S	17E	SWEET GRASS
10	39.00	NW	29	1S	17E	SWEET GRASS
11	52.00	SE	29	1S	17E	SWEET GRASS
12	85.50	N2	33	1S	17E	SWEET GRASS
13	39.25	N2	34	1S	17E	SWEET GRASS
<b>Total:</b>						838.00

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**Remarks:**

THIS APPROPRIATION OF WATER TAKES WATER FROM THE YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK DRAINAGE (BASIN 43B) AND USES IT IN THE YELLOWSTONE RIVER FROM BRIDGER CREEK TO THE CLARKS FORK YELLOW- STONE DRAINAGE (BASIN 43Q). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER THE POINT OF DIVERSION OR PLACE OF USE BASIN.